# *155 North High, Ltd. v. Cincinnati Insurance Co.*: The Advocate-Witness Rule—Trying to Define Substantial Hardship in DR 5-101(B)(4)

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## I. INTRODUCTION

By representing their clients, attorneys obtain information that benefits their clients' cases. Yet if these clients want their attorneys to testify about this information, the attorneys face almost certain disqualification. Consequently, attorneys and clients are placed in difficult decisionmaking positions: an attorney must decide early in the case whether his testimony will be necessary, thus subjecting him to disqualification, while clients must consider whether to obtain different, unfamiliar counsel, which may create economic and personal hardships. The prohibition against allowing an attorney to serve as both an advocate and witness is codified in the Disciplinary Rules of the ABA Model Code of Professional Responsibility.[1] Disciplinary Rules 5-101(B) and 5-102(A) require a lawyer, absent certain exceptions, to withdraw if he is to be an advocate and witness in the same case.[2] The Disciplinary Rules have also

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[1] The ABA Model Code of Professional Responsibility consists of Canons, Ethical Considerations, and Disciplinary Rules.

> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. . . . The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. . . . The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980).

[2] **DR 5-102** WITHDRAWAL AS COUNSEL WHEN THE LAWYER BECOMES A WITNESS

> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue

been used by courts to disqualify an attorney's firm from further representation of the client.[3] In general, the reasons for the advocate-witness rule are a desire to protect the testifying attorney's client, the opposing party, and the public's perception of the legal system and legal profession.[4]

In *155 North High, Ltd. v. Cincinnati Insurance Co.*,[5] the Ohio Supreme Court used DR 5-102(A) to disqualify the appellant's attorney.[6] The court held that DR 5-101(B)(4) is an exception to the general rule requiring disqualification,[7] and in doing so defined the terms "substantial hardship" and "distinctive value" found in (B)(4). How a court defines substantial hardship and distinctive value is pivotal in the application of the rule. Despite the importance of these terms, courts have continually failed to define them with the necessary precision that will enable attorneys to counsel their clients, and, moreover, permit clients to select a course of action that best protects their interests. In *155 North High, Ltd.*, the court favors a strict approach when

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the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

**DR 5-101** REFUSING EMPLOYMENT WHEN THE INTERESTS OF THE LAWYER MAY IMPAIR HIS INDEPENDENT PROFESSIONAL JUDGMENT

. . . .

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101, 5-102 (1980). The Model Rules counterpart to DR 5-101 and DR 5-102 is Model Rule 3.7. For a discussion of Model Rule 3.7, see *infra* Part V.

[3] *See* Kalmanovitz v. G. Heileman Brewing Co., 610 F. Supp. 1319 (D. Del. 1985); Jones v. City of Chicago, 610 F. Supp. 350 (N.D. Ill. 1984). *But see* International Elecs. Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975).

[4] *See infra* Part II.

[5] 650 N.E.2d 869 (Ohio 1995).

[6] *Id.* at 874.

[7] *See id.*

determining if the substantial hardship exception has been satisfied. Rather than promote just results, the decision creates the opportunity for inflexible injustices to occur that will create a substantial hardship for those who lose their attorney through disqualification under DR 5-102. A more client-based approach would better serve the rationales of the rule, and allow greater flexibility in determining when an attorney should be disqualified.

This Comment will analyze the different approaches used to interpret the substantial hardship exception and the reasons behind the advocate-witness rule. Part II of this Comment looks at the rationales offered in support of the advocate-witness rule, and whether these rationales are sound. Part III examines the facts and reasoning of *155 North High, Ltd.*, while Part IV discusses the Ohio Supreme Court's discussion of substantial hardship and distinctive value in light of other jurisdictions' treatments of these same terms. Finally, Part V offers an alternative approach to the present advocate-witness rule.

## II. RATIONALES SUPPORTING THE ADVOCATE-WITNESS RULE

A court's application of the substantial hardship exception partly depends on how much weight the court gives the rationales supporting the advocate-witness rule. Ethical Consideration 5-9[8] emphasizes three main reasons supporting the advocate-witness rule: (1) to protect the client of the testifying witness, (2) to protect the opposing counsel, and (3) to protect the public's perception of the legal system.

### A. *Protecting the Client*

Disqualifying the testifying lawyer prevents his client's case from being

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[8] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 (1980).

> EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

*Id.*

harmed by the lawyer's interested testimony, since this interest makes the attorney easier to impeach.[9] One court has even concluded that the testifying attorney's interest entirely destroyed the credibility of his testimony.[10] Supporters also claim that the testifying advocate, by being both a witness who is an objective reporter of facts and an advocate who vigorously champions his client's position may render the attorney less effective in these roles, thus harming the client's case.[11] Rather than benefitting the client, disqualifying his attorney because of interest actually harms the client.

A disqualified attorney may still be impeached by opposing counsel if the court allows counsel to testify because of counsel's continued interest in the outcome of the case.[12] For instance, the attorney may represent the client in other matters, or the attorney may still have a contingent fee pending on the outcome.[13] Courts allow other interested parties to testify without disqualifying them, yet lawyers are treated differently for no compelling reason.[14] Usually, a witness will testify in a manner that strengthens the case for whom they are testifying; if the concern is the witness's interest then every witness could be disqualified.[15] Furthermore, the concerns regarding the harms caused by the testifying; advocate remain speculative,[16] prompting one scholar to conclude that the interest rationale no longer has any merit.[17]

Losing his or her attorney of choice causes greater hardship on the client than any benefit the client arguably gains from disqualifying the attorney

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[9] *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975); John J. Dalton, *The Advocate-Witness Rule: Problems and Pitfalls*, C641 ALI-ABA 313, 325 (1991); Jeffrey A. Stonerock, *The Advocate-Witness Rule: Anachronism or Necessary Restraint?*, 94 DICK. L. REV. 821, 850 (1990); Richard C. Wydick, *Trial Counsel as Witness: The Code and the Model Rules*, 15 U.C. DAVIS L. REV. 651, 660 (1982).

[10] *See* Lah Ah Yew v. Dulles, 257 F.2d 744, 746–47 (9th Cir. 1958).

[11] *See* Stonerock, *supra* note 9, at 850; Wydick, *supra* note 9, at 661.

[12] *See* Harold A. Brown & Louis M. Brown, *Disqualification of the Testifying Advocate—A Firm Rule?*, 57 N.C. L. REV. 597, 611 (1979).

[13] *See* Stonerock, *supra* note 9, at 851.

[14] *See* Stephen J. Butler, Comment, *The Rule Prohibiting an Attorney from Testifying at a Client's Trial: An Ethical Paradox*, 45 U. CIN. L. REV. 268, 270 (1976).

[15] *See* Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1353 (D. Colo. 1976) (discussing the interest concern, the court states that "[n]o litigant in a modern American court, however, would seek to dredge up that proposal, for his own client would be barred from testifying for fear that he might distort the truth in his quest for success at trial").

[16] *See id.*

[17] *See* 6 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1911, at 775 (James H. Chadbourn rev. 1976).

because of interest concerns. Rather than serve the client's needs, the real loser is the client who suffers economic and personal hardships when the advocate-witness rule is applied.[18] Oddly, clients cannot waive application of the rule even though the rule is aimed at protecting them.[19] A better approach for the client is to have the attorney inform him of potential dangers to his case if the attorney served as advocate and witness.[20] If the client prefers to take the risk that the attorney's testimony may be discredited, the client should be able to keep the attorney as counsel.[21] If the attorney provides the client with bad advice, then the client can file an ineffective assistance of counsel action against the attorney.[22] The witness' interest will not go unchallenged since the opposing party can challenge it on cross-examination and the trier of fact will ultimately accord the proper weight to that testimony.[23] The other concern, that the attorney as an advocate and witness will be ineffective in these positions, is

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[18] *See* Stonerock, *supra* note 9, at 853. According to another commentator, "[i]n clumsy judicial hands, the rule has needlessly stripped clients of their trusted lawyers and of the monetary value represented by their fee investment prior to disqualification." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 379 (1986).

[19] *See* General Mill Supply Co. v. SCA Servs., Inc., 505 F. Supp. 1093, 1098 (E.D. Mich. 1981), *aff'd*, 697 F.2d 704 (6th Cir. 1982) ("[I]t is impossible for the plaintiffs to waive the prejudice to the defendants, or the prejudice to the trial process."); Supreme Beef Processors, Inc. v. American Consumer Indus., Inc., 441 F. Supp. 1064, 1068 (N.D. Tex. 1977); Brown & Brown, *supra* note 12, at 602 ("[T]he prevalent position is that although these disciplinary rules are for the protection of clients, they are also for the protection of the bar and the integrity of the court, and therefore may not be waived by the client.").

[20] *See* Butler, *supra* note 14, at 272.

[21] *See* Note, *The Advocate-Witness Rule: If Z, Then X. But Why?*, 52 N.Y.U. L. REV. 1365, 1398 (1977) (footnote omitted).

> The only viable rationale for prohibiting trial counsel from taking the witness stand is the prospect that his credibility as both witness and advocate will suffer in the eyes of the jury to the ultimate detriment of the client. But if the client is aware of such a danger—that is, if he is fully and fairly informed of the implications of remaining with the challenged attorney or firm—then no reason exists for taking the decision away from the client and placing it in the hands of the court.

*Id.*; *see also* Wydick, *supra* note 9, at 661.

[22] *See* Stonerock, *supra* note 9, at 855.

[23] *See* General Mill Supply Co. v. SCA Servs., Inc., 505 F. Supp. 1093, 1096 (E.D. Mich. 1981) (noting that plaintiffs understand that cross-examination will reveal their attorney-witness's interest yet want to retain him as counsel); Butler, *supra* note 14, at 270; John F. Sutton, Jr., *The Testifying Advocate*, 41 TEX. L. REV. 477, 483 (1963).

exaggerated, and does not support the rationales.[24] Essentially, the protection of the client rationale offered in support of the advocate-witness rule could be achieved by a more flexible process that really aims to protect the client rather than force the client to endure substantial hardships.

## B. *Protecting the Opposing Party*

Another rationale behind the advocate-witness rule is that it protects the opposing party.[25] One belief is that the attorney for the opposing party is placed in the difficult position of cross-examining a fellow bar member while maintaining professional courtesy.[26] The testifying attorney, in turn, could assert professional courtesy to frustrate the opposing attorney's cross-examination, thus rendering it less effective.[27] However, one court was more concerned that the opposing counsel's cross-examination would be too fierce.[28] By preventing the attorney from testifying, the opposing counsel supposedly maintains his objectivity, and thereby better serves his client's interests,[29] creating a level playing field between the adversaries.

The concern that the opposing attorney will be placed in a difficult position because he must cross-examine a fellow lawyer is unfounded.[30] *Failing* to

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[24] *See* Brown & Brown, *supra* note 12, at 609–10; Arnold N. Enker, *The Rationale of the Rule that Forbids a Lawyer To Be Advocate and Witness in the Same Case*, 1977 AM. B. FOUND. RES. J. 455, 459–60.

[25] *See* Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296, 300 (Ariz. 1981) ("When an attorney persists in acting both as witness and advocate, ordinary procedural safeguards designed to give the parties a full and fair hearing become problematic. For example, the familiar mechanics of question-and-answer interrogation become impossible.").

[26] *See, e.g.*, Stonerock, *supra* note 9, at 857–58. Lawyers have a duty to treat other lawyers with respect when acting as attorneys. *See id.* A main function of a cross-examination is to test the credibility of the witness. *See id.* During cross-examination, a testifying advocate can claim professional courtesy as an attorney which prevents the cross-examining attorney from testing the advocate-witness's credibility as zealously as he normally would because he does not want to discredit the advocate-witness or the legal profession. *See id.*

[27] *See id.* at 857. ("Allowing an attorney to testify could allow him to abuse professional courtesy to blunt the opposition's cross-examination.").

[28] *See* Jones v. City of Chicago, 610 F. Supp. 350, 362 (N.D. Ill. 1984) ("Embitterment between counsel . . . is likely to occur when one counsel seeks to impeach the credibility of opposing counsel acting as a witness.").

[29] *See* Stonerock, *supra* note 9, at 857–58.

[30] *But see* Dalton, *supra* note 9, at 322–23 ("While it is questionable whether an attorney would sacrifice an ethical obligation to the client of zealously representing him for

cross-examine completely the testifying attorney actually places the opposing counsel in an ethical dilemma because of an attorney's duty to represent his client zealously.[31] Furthermore, even if the attorney is disqualified as counsel, the witness remains an attorney still subject to professional courtesy, so the disqualification achieves little, if anything, in support of this rationale.[32] Rather than rely on the advocate-witness rule to protect the opposing party, rules of evidence and the trial judge's supervision over the trial can offer the necessary protection.[33]

Supposedly, the advocate-witness rule also protects the opposing party by eliminating the possibility of the testifying witness offering opinion during his arguments to the court.[34] Related to this concern is the belief that jurors will overvalue the attorney's testimony and arguments because the attorney can defend his credibility during closing arguments.[35] This enhanced credibility assertion suffers from two main flaws. First, the trial judge, in his supervisory capacity, would prevent the attorney from using his closing argument to support his credibility. Second, whether a jury would place more weight on the attorney's testimony ignores the reality that jurors will put more weight on a witness's testimony for a variety of reasons.[36] A jury may actually place less

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the sake of courtesy to a fellow bar member, it can be a troublesome dilemma that distracts from the purpose of the trial.").

[31] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980) (Ethical Consideration 7-1 states in pertinent part, "[t]he duty of a lawyer, both to his client and to the legal system is to represent his client zealously . . . ."); *see also* Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1354 (D. Colo. 1976) ("[T]he duty of an attorney to his client, to represent the client completely and zealously as required by Canons 6 and 7, easily outweighs and overcomes any professional loyalty.").

[32] *See* Stonerock, *supra* note 9, at 858.

[33] *See id.*

[34] *See id.* at 858–59.

[35] *See* Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296, 300 (Ariz. 1981) (discussing the dangers of allowing an attorney to testify, the court states that "[t]he advocate who testifies places himself in the position of being able to argue his own credibility"); Stonerock, *supra* note 9, at 858–59.

[36] *See* Stonerock, *supra* note 9, at 859–60 ("If a jury chooses to give unusual weight to a counsel's argument, it is probably due to the counsel's method of presentation or his reputation, and not because of an oath he took at some earlier point in the trial."); Wydick, *supra* note 9, at 663. As one commentator observed:

> The circumstance that he is both advocate and witness does not in itself enhance his standing as a witness or make his advocacy more appealing. The appearance of a particular lawyer as either a witness or an advocate may be influential with judge and jury, by reason of reputation or personal magnetism, but it is difficult to see how the

weight on the attorney's testimony because of any perceived interest the attorney may possess.[37]

### C. *Protecting the Public's Perception of the Legal System and Legal Profession*

The most convincing rationale in support of the advocate-witness rule is that the rule protects the legal system and legal profession from negative images the public might have if the attorney was allowed to be both advocate and witness.[38] Commentators agree that lawyers and the legal system have an interest in preventing negative stereotyping.[39] This interest is so significant that support for the rule stems from a concern for any *appearance* of impropriety rather than actual negative attitudes.[40]

Whether the public, other than jurors in particular cases, have any knowledge of the advocate-witness prohibition is questionable,[41] as is whether

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> fact that he simultaneously appears as both could increase his influence on the trier of fact.

Sutton, *supra* note 23, at 480.

[37] *See supra* Part II.A. Those that support the rule cite two arguments in tension with each other. They claim that an attorney will be less effective because he can be impeached by interest. *See* Stonerock, *supra* note 9, at 850. Yet they also argue that the attorney will be more effective in his closing arguments because this same interest supports his credibility. *See id.* at 858–59.

[38] Courts express a strong interest in maintaining the integrity of the legal system. *See* Wheat v. United States, 486 U.S. 153, 160 (1988) (concluding that a criminal defendant cannot waive his right to conflict free counsel because "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them").

[39] *See* 6 WIGMORE, *supra* note 17, § 1911, at 775–76 (concluding that the interest in protecting the legal profession "is at once the most potent and most common reason judicially advanced"). As one commentator noted:

> No doubt the lay observer's confidence in the judicial system is shaken when he observes the advocate leave the counsel table to give testimony contradicting witnesses for the opposition. The fear that the public will think lawyers distort the truth in favor of the client, rather than any fear that lawyers do distort the truth, is one real basis for [DR 5-102].

Sutton, *supra* note 23, at 482.

[40] *See* Comden v. Superior Ct. of Los Angeles County, 576 P.2d 971, 973 (Cal. 1978) ("[T]he prohibition seeks to avoid the *appearance* of attorney impropriety.").

[41] *See* Note, *supra* note 21, at 1390 ("It is considerably less clear whether members of

the public actually concerns itself when an attorney acts as an advocate and witness in the same case.[42] Public perception is important, but the public will view any witness as biased in favor of the party for whom he is testifying.[43] Furthermore, the concern for the public's perception is based on an overly cynical view of the public's opinion toward the legal system. The court in *International Electronics Corp. v. Flanzer*[44] cautioned against adopting an unnecessarily cynical view:

> Almost every party to a civil lawsuit (and his agents) is suspect of stretching the truth for his own cause, and to the most cynical, the very service of the complaint is a prelude to perjury. When we deal with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct.[45]

The costs to the client of a strict interpretation of the advocate-witness rule outweighs any perceived benefits in protecting the public's perception of the legal system and profession.[46] In fact, members of the public who lose their counsel because of the advocate-witness rule will possess a more negative attitude toward the legal system, viewing it as an inflexible, impersonal process unconcerned with the client.[47] The rule further damages the legal profession

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the public who are not jurors have any knowledge of limitations on an attorney's courtroom behavior, or even an intuition that it is somehow 'wrong' for an attorney to function as both advocate and witness.").

[42] *See* Stonerock, *supra* note 9, at 866 ("No evidence exists to show that the public is concerned about attorneys testifying in the same case in which they are trial counsel. Such public concern may be only a theory that attorneys impose upon themselves.").

[43] *See id.*

[44] 527 F.2d 1288 (2d Cir. 1975).

[45] *Id.* at 1294.

[46] *See also* Enker, *supra* note 24, at 459.

> Protection of the profession's image seems at best a makeweight. Its force is a function of the degree to which the forbidden practice is regarded as intrinsically wrongful. Absent an explanation of the impropriety of the practice itself, the argument from professional image hardly seems sufficiently potent to explain the intensity with which the practice traditionally has been denounced.

*Id.*

[47] *See* Federal Deposit Ins. Corp. v. United States Fire Ins. Co., 50 F.3d 1304, 1317 (5th Cir. 1995) ("Driven solely by undue preoccupation with the disqualification issue, prolonged delay in addressing the merits of a case, in and of itself, can do little to install confidence in the judicial system."); Stonerock, *supra* note 9, at 868 ("One public

because it presumes that lawyers "lack integrity," even when this is usually untrue.[48] Two commentators even claim that the rule itself perpetuates a negative perception of the legal profession.[49]

Concern for the public's perception of the legal system and legal profession is justified. However, protection of it must be tempered by an interest in achieving just results. Striking a proper balance between these goals must be achieved lest the client be subjected to unnecessary substantial hardships. A better approach is to adopt a less stringent view of the substantial hardship exception.[50] Therefore, the client's interests are accounted for meaningfully, and in those cases where the substantial hardship exception is not satisfied, disqualifying the attorney will safeguard the public's perception in the legal system and profession. Instead of this more moderate approach, the Ohio Supreme Court adopted a strict interpretation of the substantial hardship exception.

## III. *155 NORTH HIGH, LTD. V. CINCINNATI INSURANCE CO.*[51]

### A. *The Facts*

On July 25, 1987 a fire completely destroyed property owned by 155 North High, Limited ("155 North High") and insured by Cincinnati Insurance Company ("Cincinnati Insurance").[52] After the fire, Charles Ruma, 155 North High's general partner, contacted his attorney, James Wiles.[53] Ruma contacted Wiles because of Wiles's expertise in large fire loss claims. Wiles had handled over 200 fire-related cases involving claims for arson, product liability, subrogation, severe personal injury, and death, including twenty-five to thirty post fire insurance adjustment related claims.[54] Wiles, in turn, contacted

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perception that does exist is that the law is replete with technicalities that sometimes produce unfair results. Barring a witness from testifying because he is the trial attorney may impress the public as such a technicality.").

[48] *See* Stonerock, *supra* note 9, at 867.

[49] *See* Brown & Brown, *supra* note 12, at 613 ("[T]he rule is self-perpetuating: it is unseemly for an attorney whose firm is trial counsel in the case to testify *because* there is a rule of ethics to the contrary.").

[50] *See infra* Part V.

[51] 650 N.E.2d 869 (Ohio 1995).

[52] The commercial insurance policy covered 1984 to 1987 and provided property loss coverage and a special endorsement for rental value insurance. *See id.* at 870.

[53] *See id.* at 870. Wiles remains a practicing attorney in the Columbus, Ohio firm of Wiles, Doucher, Van Buren & Boyle Co., L.P.A. 13 MARTINDALE-HUBBELL LAW DIRECTORY OH 516B (1996).

[54] *See* Appellant's Reply Brief at 2.

Cincinnati Insurance's claim adjuster, Stephen Schwartz.[55] In December of 1987, Cincinnati Insurance paid 155 North High $1,030,000, which represented the full amount for property loss coverage, and $92,000 for the rental value insurance.[56] Despite these payments, the parties disputed the amount still owed.[57] As a result of this disagreement, in December 1988, 155 North High filed suit against Cincinnati Insurance alleging a bad faith breach of the insurance contract stemming from Cincinnati Insurance's alleged delay and intentional mishandling of the claims.[58] In its memorandum contra to Cincinnati Insurance's motion for summary judgment, 155 North High attached an affidavit from Wiles supporting its claims for breach of the insurance company's duty of good-faith claims handling.[59]

In preparation for the trial, Wiles took Schwartz's deposition, which suffered from lack of knowledge, memory, recall, and certainty of answers.[60] Therefore, after the depositions, Wiles listed himself as a potential witness in the case.[61] At trial before a common pleas court referee, Cincinnati Insurance notified the referee that Wiles suggested that he might testify for 155 North High.[62] In response, Wiles indicated that he did not know if he would testify until he heard testimony from Cincinnati Insurance's witnesses, yet told the trial referee that he did not feel that there would be a violation of any

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[55] One can question why Wiles did not take someone with him during these discussions so this person could testify about the subject matter of the conversations, and Wiles could remain 155 North High's attorney. Wiles probably did not take someone to accompany him because he did not think that Schwartz would later suffer from a lack of memory regarding these events. *See* Appellant's Merit Brief at 2–3. Moreover, since it is costly to bring another attorney to these meetings, clients would balk at paying additional fees.

[56] *See 155 North High, Ltd.*, 650 N.E.2d at 870.

[57] *See id.*

[58] *See id.* The advocate-witness rule often arises in bad faith insurance claims cases. *See* Timothy J. Fitzgerald, *Ethics—It's Legal, But Is It Right?*, *in* BAD FAITH LITIG. IN OHIO 75, 77 (National Business Institute 1995) ("An attorney who involves himself in the initial settlement negotiations of a claim may find himself or herself barred from trying the subsequent bad faith case because of his or her status as an important witness to the settlement proceedings.").

[59] *See 155 North High, Ltd.*, 650 N.E.2d at 870. The trial court ultimately denied the motion for summary judgment. *See id.*

[60] *See id.* Schwartz did little preparation for the deposition, testifying that "he did not review his claim file (consisting of approximately 167 pages) in any detail; rather, he '* * * just thumbed through it.'" Appellant's Merit Brief at 2. Schwartz's second deposition was not any better, as it "contained over one hundred (100) lack of knowledge, memory, recall, and certainty answers." *Id.*

[61] *See 155 North High, Ltd.*, 650 N.E.2d at 870.

[62] *See id.*

Disciplinary Rules if he did so.[63] During the trial Wiles served as lead counsel, and, eventually, on the trial's fourth day he stated his intention to take the stand.[64] Though counsel for Cincinnati Insurance objected to Wiles's role as advocate and witness,[65] the referee nonetheless deferred to Wiles's judgment in overruling the motion.[66]

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[63] *See id.* At trial, Schwartz, again, failed to recall the details of conversations between Cincinnati Insurance and 155 North High. *See* Appellant's Merit Brief at 2–3. Wiles did not think that he would be forced to testify because Schwartz claimed during his depositions that he had only reviewed his file "briefly," indicating that thorough pre-trial preparation would enable Schwartz to testify completely." *Id.* at 2–3. Furthermore, Schwartz never denied having conversations with Wiles, he just could not recall the details. *See id.* at 2–3.

[64] *See 155 North High, Ltd.*, 650 N.E.2d at 871. As lead counsel he conducted the direct and cross examinations of most of the witnesses, including Schwartz. *See id.* During questioning he asked Schwartz and others about conversations and meetings they had had with him after the fire and up to the commencement of the suit. *See id.* at 870–71.

[65] Motions to disqualify based on the advocate-witness rule often are filed for tactical reasons. *See* J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring) ("[T]he attempt by an opposing party to disqualify the other side's lawyer must be viewed as a part of the tactics of an adversary proceeding."); Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296, 302 (Ariz. 1981) ("By misusing the advocate-witness prohibition, an attorney might elbow opposing counsel out of the litigation for tactical reasons."); Brown & Brown, *supra* note 12, at 620 ("Even when the motion will eventually be lost, there may be an economic incentive to make a disqualification motion because the cost to the opponent of waging the battle may be quite large . . . ."). As one commentator observed:

> Motions to disqualify have found favor as a delay strategy for many litigators. Some attorneys also resort to such motions when facing more competent counsel then they feel comfortable confronting. Counsel might even "set up" the opposition for disqualification. . . . Courts have become increasingly alarmed at the increase in the number of motions to disqualify opposing counsel. Many courts see these motions as harassment tactics that, in the hands of an unscrupulous lawyer, can seriously undermine a litigant's case.

Dalton, *supra* note 9, at 332–33.

The facts indicate that Cincinnati Insurance was well aware of Wiles's intention to testify in case Schwartz remained unprepared, yet did not file a motion to disqualify Wiles until the trial's fifth day. *See* Appellant's Merit Brief at 3 & n.2. Schwartz's lack of memory may also have been the result of a strategical decision by Cincinnati Insurance. In fact, Wiles considered Schwartz's lack of memory as "a stonewalling tactic by counsel for [Cincinnati Insurance] to assist in settlement and that Schwartz's memory and preparation would improve." *Id.* at 2.

[66] *See 155 North High, Ltd.*, 650 N.E.2d at 871.

While on the witness stand, Wiles testified in detail about the conversations he had with Schwartz, and what Cincinnati Insurance had done after the fire.[67] After testifying, Wiles called 155 North High's final witness, and then rested its case. Thereafter, Wiles cross-examined three witnesses that Cincinnati Insurance called in its case-in-chief.[68]

At the conclusion of the trial, the referee found in favor of 155 North High, and recommended that it receive $25,000 in compensatory damages and $100,000 in punitive damages, a judgment which the trial court decided to adopt.[69] On the second appeal, the court of appeals found that the trial court committed prejudicial error in letting Wiles testify, and awarded Cincinnati Insurance a new trial.[70] After this decision, Cincinnati Insurance filed a motion with the Ohio Supreme Court to certify the record.[71]

## B. *The Decision*

Justice Francis E. Sweeney's opinion focused on DR 5-102(A),[72] and the substantial hardship exception found in DR 5-101(B)(4).[73] Since Wiles possessed personal knowledge of the alleged facts leading to the allegation of bad-faith handling of the claims, and participated in the negotiations and dealings, Justice Sweeney stated that Wiles "ought to testify."[74] Wiles's testimony was also admissible.[75] In determining this, the court applied a test

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[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See id.* In the first appeal, the court of appeals affirmed in part and reversed in part, remanding two issues: (1) whether the referee erred in permitting Wiles to testify; and (2) whether the record supported a finding that Cincinnati Insurance breached its duty of good faith claims handling. *See id.* On remand, the trial court again adopted the referee's report, and entered judgment for 155 North High. *See id.*

[71] *See id.*

[72] DR 5-102(B) did not apply because Wiles was called to testify on behalf of his client rather than against his client. *See id.* at 871 n.2.

[73] Exceptions found in DR 5-101(B)(1) through (3) did not apply to this case. *See id.* at 873 n.4.

[74] *Id.* at 872–73. The "ought to testify" component of the rule has also been subject to debate. *See* Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp., 546 F.2d 530, 538 n.21 (3d Cir. 1976). Though this portion of the rule offers fertile ground for analysis, this Comment will not discuss it, limiting its focus to the substantial hardship exception.

[75] *See 155 North High, Ltd.*, 650 N.E.2d at 872–73.

developed in *Mentor Lagoons, Inc. v. Rubin*.[76] First, the court must determine the admissibility of the attorney's testimony without reference to the Disciplinary Rules. Second, if the testimony is admissible, the opposing party or court can move for the attorney to withdraw or be disqualified. Third, upon such motion, the court must consider if any exceptions in the Disciplinary Rules would permit the attorney to continue representation.[77] Based on this analysis, Wiles would be disqualified unless the disqualification would work as a substantial hardship on the client because of his distinctive value as a lawyer in this particular case.[78] To satisfy this exception there must be a showing that because of the attorney's distinctive value a substantial hardship results to the client if the lawyer is disqualified.[79] Because these terms had not yet been defined by the court, the court drew from Ohio appellate court cases and cases from other jurisdictions, and adopted a strict interpretation of substantial hardship and distinctive value.[80] After adopting this standard, the court concluded that "[n]either familiarity with the case nor mere added expenses are sufficient to prove this exception."[81] Other than this brief statement, the court offered no further guidance for determining what distinctive value and substantial hardship mean.

In addition to the court's failed attempt to define substantial hardship and distinctive value, the decision ignored any meaningful application of the rationales supporting the advocate-witness rule to the facts of the case. The only rationale that has any merit is the concern for protecting the public's

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[76] 510 N.E.2d 379 (Ohio 1987).

[77] *Id.* at 382.

[78] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(4) (1980).

[79] *See 155 North High, Ltd.*, 650 N.E.2d at 873. The hardship *must* be caused by the attorney's distinctive value. If the client would suffer a substantial hardship, but the hardship is not caused by the distinctive value of his attorney, the exception does not apply. *See In re* Lathen, 654 P.2d 1110, 1114 (Or. 1982); MacArthur v. Bank of New York, 524 F. Supp. 1205, 1210 (S.D.N.Y. 1981).

[80] Nowhere in its decision did the court state that it was adopting the strict approach to define substantial hardship and distinctive value. The court implies that it favors such a view based on the cases it cites, which support characteristics of a strict approach, and its discussion of these cases. *See* Supreme Beef Processors, Inc. v. American Consumer Indus., Inc., 441 F. Supp. 1064 (N.D. Tex. 1977); Mentor Lagoons, Inc. v. Teague, 595 N.E.2d 392 (Ohio Ct. App. 1991); Schaub v. Mentor Lagoons Marina, No. 89-L-14-054, 1990 WL 71023 (Ohio Ct. App. May 25, 1990), *aff'd*, 573 N.E.2d 69 (Ohio 1991); Richardson v. Board of Revision of Cuyahoga County, Nos. 38566, 38567, 38569, 38570 (Ohio Ct. App. Mar. 15, 1979); Warrilow v. Norrell, 791 S.W.2d 515 (Tex. Ct. App. 1989).

[81] *155 North High, Ltd.*, 650 N.E.2d at 874.

perception of the legal system and legal profession. Wiles's disqualification did not protect the client. 155 North High likely wanted to keep Wiles as its counsel because of the attorney's relationship with the client, and his significant preparation of the case.[82] If the client was aware that Wiles's testimony would be easily impeachable because of interest, yet wanted Wiles to remain as counsel, then there is no harm to the client in allowing Wiles to testify and remain as advocate. Wiles's disqualification also did not protect Cincinnati Insurance. Nothing suggests that Cincinnati Insurance's counsel would be handicapped in questioning Wiles. Furthermore, the weight accorded Wiles's testimony would not necessarily be increased because of his role as advocate and witness.

The best reason for disqualifying Wiles would be to protect the institutional integrity of the legal system and the public's perception of the legal profession, yet in this particular case, the facts suggest such protection would not be vital. The trial originally took place before a common pleas court referee,[83] therefore no jurors were aware of Wiles's dual role as advocate and witness.[84] Consequently, the public would not possess a more cynical view of the legal system or legal profession since few would know of Wiles's roles in the case. In sum, the legal system and profession do not stand to benefit significantly from Wiles's disqualification.

By failing to apply the rationales behind the rule to the case, and most importantly, ignoring more liberal approaches in defining substantial hardship and distinctive value, the court defined these terms in a fashion that will increase the likelihood of abuse in the application of DR 5-102 and DR 5-101(B)(4). The court's decision establishes a definition of substantial hardship that will actually work a substantial hardship on clients who lose their attorneys under DR 5-102. Clients who lose their attorneys will face the economic costs of obtaining new counsel, while also dealing with a delay in the resolution of their disputes since the new attorney will need to familiarize himself with the case.[85] Furthermore, the loss of familiar counsel with whom the client has had a long-standing relationship creates personal hardships for the client who must

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[82] At the time of the trial, Wiles had represented 155 North High for over twenty-five months. *See* Appellant's Reply Brief at 2.

[83] *See 155 North High, Ltd.*, 650 N.E.2d at 870.

[84] A trial can take place before a referee either when the parties are not entitled to a jury trial or the parties consent in writing or in the record. *See* OHIO CIV. R. 53(C).

[85] Based on the court's decision, people will conceivably need to retain two lawyers; one for pre-trial negotiation and discussions, and another for the actual trial. As argued by counsel for 155 North High, under the court's decision, "counsel for the insured could never serve as trial counsel in any eventual litigation." Appellant's Reply Brief at 6.

now navigate the legal system with an unfamiliar attorney.[86]

## IV. DEFINING "SUBSTANTIAL HARDSHIP" AND "DISTINCTIVE VALUE": THREE APPROACHES

Decisions defining substantial hardship and distinctive value generally fall into three main interpretive categories: (1) a strict approach; (2) a middle approach; and (3) a client-based approach.[87] The strict approach uses an extremely high standard for substantial hardship, which is rarely, if ever, satisfied. The middle approach is more lenient in that it may permit the attorney to continue representation up to the trial, but then disqualifies the attorney thereafter. In doing so, the middle approach takes the client's interests into account to some extent. In contrast, the client-based approach takes the client's interests and preferences completely into consideration when determining whether to disqualify the attorney. Consequently, the client-based approach results in fewer disqualifications.

### A. *The Strict Approach*

Applying the strict approach will always lead to disqualification of the attorney.[88] Nevertheless, a strict interpretation of substantial hardship and distinctive value is popular with courts.[89] This strict approach, coupled with

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[86] *But see Ex parte* Sanders, 441 So. 2d 901, 904 (Ala. 1983) ("This professional and social rapport is desirable, and its absence may cause some inconvenience and anxiety, but it certainly does not rise to the level of 'substantial hardship.'").

[87] *See* Stonerock, *supra* note 9, at 838–39.

[88] None of the cases that applied the strict approach permitted the attorney to remain as counsel.

[89] *See* Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp., 546 F.2d 530 (3d Cir. 1976); Draganescu v. First Nat'l Bank of Hollywood, 502 F.2d 550 (5th Cir. 1974); Kalmanovitz v. G. Heileman Brewing Co., 610 F. Supp. 1319 (D. Del. 1985); Jones v. City of Chicago, 610 F. Supp. 350 (N.D. Ill. 1984); Teleprompter of Erie, Inc. v. City of Erie, 573 F. Supp. 963 (W.D. Pa. 1983); MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981); General Mill Supply Co. v. SCA Servs., Inc., 505 F. Supp. 1093 (E.D. Mich. 1981); Supreme Beef Processors, Inc. v. American Consumer Indus., Inc., 441 F. Supp. 1064 (N.D. Tex. 1977); United States *ex rel.* Sheldon Electric Co. v. Blackhawk Heating & Plumbing Co., 423 F. Supp. 486 (S.D.N.Y. 1976); Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296 (Ariz. 1981); Comden v. Superior Ct. of Los Angeles County, 576 P.2d 971 (Cal. 1978); G.A.C. Commercial Corp. v. Mahoney Typographers, Inc., 238 N.W.2d 575 (Mich. Ct. App. 1975); Tru-Bite Labs, Inc. v. Ashman, 388 N.Y.S.2d 279 (App. Div. 1976); Town of Mebane v. Iowa Mut. Ins.

the presumption against allowing the attorney to remain as an advocate,[90] results in an exceedingly rigid application of the rule. Upon applying the strict approach, courts have disqualified attorneys who gained a familiarity with the case through spending large amounts of time in case preparation,[91] or who have a long-standing relationship with the client.[92] Based on these outcomes, commentators have criticized the strict approach because it "demands an exceedingly high, probably impossible, and certainly inordinate showing of hardship before the exception can be triggered."[93] One case that best demonstrates the inflexible results of the strict approach is *United States ex rel. Sheldon Electric Co. v. Blackhawk Heating & Plumbing Co.*[94]

In this case the United States District Court for the Southern District of New York disqualified an attorney and his entire firm from continuing to represent the plaintiff despite the plaintiff's ten year relationship with the law firm, and the firm's approximately 450 hours of work expended in preparation of the suit.[95] Moreover, the court decided to disqualify the attorney and the

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Co., 220 S.E.2d 623 (N.C. Ct. App. 1975); Mentor Lagoons, Inc. v. Teague, 595 N.E.2d 392 (Ohio Ct. App. 1991); Schaub v. Mentor Lagoons Marina, No. 89-L-14-054, 1990 WL 71023 (Ohio Ct. App. May 25, 1990); Richardson v. Board of Revision of Cuyahoga County, Nos. 38566, 38567, 38569, 38570 (Ohio Ct. App. Mar. 15, 1979); *In re* Lathen, 654 P.2d 1110 (Or. 1982); Warrilow v. Norrell, 791 S.W.2d 515 (Tex. Ct. App. 1989); *see also* Barbara J. Moss, *Ethical Prohibitions Against a Lawyer's Serving as Both Advocate and Witness*, 23 MEM. ST. U. L. REV. 555, 561 (1993) ("[M]any courts have been reluctant to find a substantial hardship to the client that would permit the advocate to continue representation where he or she is a material witness.").

[90] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-10 (1980) ("Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.").

[91] *See* MacArthur v. Bank of New York, 524 F. Supp. 1205, 1210 (S.D.N.Y. 1981) (concluding that "[h]ardship alone, however substantial, is insufficient to permit continued representation. The deprivation to the client will often be greatest precisely when the attorney was most intimately involved in, and familiar with, the events giving rise to the suit.").

[92] *See* United States *ex rel.* Sheldon Electric Co. v. Blackhawk Heating & Plumbing Co., 423 F. Supp. 486, 490 (S.D.N.Y. 1976).

[93] *See* Sylvia Stevens, *A Level Playing Field*, OR. ST. B. BULL., Jan. 1995, at 33, 34 ("Proving the disqualification will work a substantial hardship requires extreme and exceptional circumstances . . . ."); Note, *supra* note 21, at 1375.

[94] 423 F. Supp. 486 (S.D.N.Y. 1976).

[95] *See id.* at 490.

> In support of this contention plaintiff cites a ten-year history of representation by this particular law firm and the approximately 450 hours of time expended in connection with the multitude of claims that comprise plaintiff's case . . . . Yet, aside from these

firm despite the fact that the opposition filed the motion to disqualify on the day the trial began.[96]

Another example of the unjust results created by the strict approach is *Draganescu v. First National Bank of Hollywood*.[97] This case involved a suit by the plaintiffs for negligent failure to prepare a will.[98] Prior to her death, the decedent hired an attorney specializing in the representation of Romanian émigrés and nationals.[99] The attorney contacted the defendant, First National Hollywood Bank, to instruct it as to the specific terms and requirements of the will.[100] When the decedent died intestate, the plaintiffs, all Romanian nationals, hired the same attorney who had originally contacted the bank.[101] Since the attorney was apparently the only person who had spoken with the bank regarding the will, he would testify at the trial.[102] The district judge ruled that the attorney could not represent the plaintiffs since he was going to testify for them.[103] In denying the plaintiffs' motion to reverse the district court's order, the court of appeals rejected the plaintiffs' contention that the substantial hardship exception applied.[104] The plaintiffs argued that the attorney's ability to speak Romanian, his long-standing relationship with the decedent, his familiarity with representing Romanian nationals, and the reluctance of other attorneys to take cases involving Romanians on a contingent fee basis rendered him uniquely qualified to represent them.[105] If the attorney was disqualified, it would work as a substantial hardship on the plaintiffs precisely because of the attorney's distinctive value. Completely ignoring the clients' interests in retaining counsel, and the personal and financial hardships the plaintiffs would

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> general statements, the record is devoid of any indication of Fine, Tofel & Saxl's particular value to plaintiff on the issue of the validity of the Release, and the Court finds that the evidence before it is insufficient to allow the firm to continue representation under the exception delineated by D.R. 5-101(B)(4).

*Id.*

[96] *See id.* Such a decision suggests the tactical role a motion to disqualify assumes in litigation. The record is unclear why the opposition waited so long to file the motion, but strategy was undoubtedly a factor. For additional comments on the tactical use of motions to disqualify, see *supra* note 65.

[97] 502 F.2d 550 (5th Cir. 1974).

[98] *See id.* at 550.

[99] *See id.*

[100] *See id.*

[101] *See id.*

[102] *See id.* at 550–51.

[103] *See id.*

[104] *See id.* at 552.

[105] *See id.*

suffer, the court affirmed the attorney's disqualification.[106] *Blackhawk Heating & Plumbing*and *Draganescu* exemplify the hardships a client faces if the court applies a strict interpretation of the substantial hardship exception.[107]

Due to the court's disqualification of the attorney and his firm, the client faces a lose-lose situation: he can either keep counsel and face possible disqualification or he can obtain new counsel, increasing his costs.[108] Most courts that adhere to a strict interpretation of substantial hardship believe that recognizing delay and cost increases will render the rule ineffective.[109] Nevertheless, a client that loses representation from a firm that he had forged a ten year relationship with, and is thus forced to obtain other counsel at economic and personal costs, would consider the disqualification as working a substantial hardship.[110] The potential for similar incredible results now exists in Ohio because of the court's adoption of the strict approach to substantial hardship.[111]

In *155 North High, Ltd.*, the court explicitly rejected "financial hardship or long-time familiarity with the case" as satisfying the (B)(4) exception.[112] The court's interpretation runs directly counter to the American Bar Association's (ABA) formal opinion discussing when a substantial hardship might exist.[113] Instances where the ABA suggests a substantial hardship would exist if the attorney and firm were disqualified include (1) lengthy preparation of a

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[106] *See id.* at 553.

[107] Broadly speaking, the main hardships a client suffers under the advocate-witness rule are (1) loss of counsel that is familiar with the case and the client's past business or litigation activities, (2) economic hardship that results when the client must pay for another attorney, and (3) delays in the resolution of the dispute. Despite these hardships, courts adopting the strict approach apparently consider the rationales supporting the advocate-witness rule to outweigh the costs to the client.

[108] *See* Dalton, *supra* note 9, at 330.

[109] *See, e.g.*, MacArthur v. Bank of New York, 524 F. Supp. 1205, 1210 (S.D.N.Y. 1981) ("But if the expense and delay routinely incident to disqualification satisfied the substantial-hardship exception, that exception would soon swallow the rule."). Granted, marginal delays and costs should not be given much weight under the substantial hardship exception, but when 450 hours have been spent in preparation of the case, and the motion is filed on the day of the trial, recognizing the inevitable delays and costs that result hardly swallow up the rule's effectiveness.

[110] *See* Brown & Brown, *supra* note 12, at 614.

[111] No case was located that applied the strict approach yet permitted the attorney to stay on as counsel. Thus, there is no way to determine what facts would actually constitute a substantial hardship under the strict approach.

[112] *155 North High, Ltd.*, 650 N.E.2d at 874.

[113] *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975).

complex suit and (2) "*a long or extensive professional relationship with a client* . . . ."[114] Wiles's long and extensive relationship with 155 North High's general partner, Charles Ruma, means that 155 North High would suffer a substantial hardship because Wiles was disqualified.[115]

The court's narrow interpretation also ignores the role that lawyers assume when representing clients. During negotiations, settlement discussions, and other meetings attorneys usually are the only witnesses for their clients as to what transpires.[116] As two commentators noted, "an attorney's role as potential witness is often part of his role as his client's representative."[117] Furthermore, clients want attorneys to play this specific role because of the attorney's expertise in the legal field compared to the client's. Merely by serving his client's needs, an attorney places himself in the position of being disqualified if he must testify for his client.

Aside from the difficult choice the court's strict definition creates for the attorney, another troublesome aspect of the decision is the court's failure to develop any concrete guidelines that attorneys can follow in determining whether they may face disqualification under the advocate-witness rule. For example, the court merely says that "'substantial hardship' requires more than . . . mere financial hardship or long-time familiarity with the case,"[118] but what and how much more? Furthermore, the court fails to indicate how much, if any, amount of time expended on a lawsuit would eventually satisfy the substantial hardship exception.[119] The court offers the most guidance when it concludes that to prove distinctive value Wiles would need to show "expertise in a specialized area of law."[120] A thorough understanding of patent law would

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[114] *Id.* (emphasis added).

[115] Prior to this dispute, Wiles had done a significant amount of work for Charles Ruma, 155 North High's general partner, in other matters. *See* Interview with James J. Brudney, Jr., Esq., Counsel of Record for Appellant in *155 North High, Ltd.*, in Columbus, Ohio (Feb. 23, 1996).

[116] *See* Brown & Brown, *supra* note 12, at 609–10. As noted earlier, making the attorney bring a person with him in case an advocate-witness rule conflict subsequently surfaces is economically impractical, and a burden on client and attorney.

[117] *Id.* at 610.

[118] 155 North High, Ltd. v. Cincinnati Ins. Co., 650 N.E.2d 869, 874 (Ohio 1995).

[119] *See supra* note 109 and accompanying text; *see also Ex parte* Sanders, 441 So. 2d 901, 903–04 (Ala. 1983) (concluding that a 20 year relationship and 400 hours expended on the case at the cost of $4,000 did not create a substantial hardship).

[120] *155 North High, Ltd.*, 650 N.E.2d at 874. Wiles possessed an expertise in fire-related claims, having handled over 200 of them, including twenty-five to thirty post fire insurance adjustment related claims. *See* Appellant's Reply Brief at 2. 155 North High

apparently satisfy this definition, but one court still disqualified an attorney in a patent case despite the attorney's knowledge of patent law.[121] A compelling argument can be made that even expertise in litigation, usually not considered a specialized area of law, should be enough to satisfy the substantial hardship exception, since all litigators are not equal.[122] Yet the court, in its opinion precludes such a finding.[123]

The court's decision places the attorney in the position of defining the terms substantial hardship and distinctive value even though the court claims to have defined these terms.[124] Placed in the position of predicting whether a court will find that the substantial hardship exception applies, an attorney will have dual concerns. Not only must he represent his client, but if he concludes that he may need to testify for his client, the attorney will also have to realize that subsequent work may be costly for his client and himself if the attorney fails to satisfy the substantial hardship exception. Either result exerts a hardship on the client.

### B. *The Middle View*

Taking a less stringent approach to the substantial hardship exception, some courts have provided the client with some leeway prior to trial in determining whether the attorney will be disqualified.[125] For example, in *Norman Norrell, Inc. v. Federated Department Stores, Inc.*[126] the District Court for the Southern District of New York allowed plaintiff's firm to maintain representation of Norrell during the pretrial, but disqualified the

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retained Wiles largely because of his expertise in fire-related claims. *See* Appellant's Merit Brief at 1 n.1.

[121] *See* Universal Athletic Sales Co. v. American Gym Recreational & Athletic Equip. Corp., 546 F.2d 530, 538 n.21 (3d Cir. 1976); Connell v. Clairol, Inc., 440 F. Supp. 17, 19 (N.D. Ga. 1977) (stating that the substantial hardship exception did not apply since the plaintiffs had not shown why other patent attorneys would be unable to handle the case).

[122] Consider the differences between an experienced criminal defense lawyer, and a young, court-appointed public defender. If an experienced lawyer was disqualified it would certainly work a hardship on his client. *See* United States v. Baca, 27 M.J. 110 (C.M.A. 1988). Differences in attorneys' abilities also surface in civil cases. Clients select attorneys precisely because some attorneys are better than others.

[123] *See 155 North High, Ltd.*, 650 N.E.2d at 873.

[124] *See id.*

[125] *See* Norman Norrell, Inc. v. Federated Dep't Stores, Inc., 450 F. Supp. 127, 131 (S.D.N.Y. 1978); Miller Elec. Const., Inc. v. Devine Lighting Co., Inc., 421 F. Supp. 1020, 1023 (W.D. Pa. 1976).

[126] 450 F. Supp. 127 (S.D.N.Y. 1978).

attorney and his firm for the actual trial.[127]

*Norman Norrell, Inc.* involved an antitrust suit where the plaintiff sued the defendant for damages as a result of the defendant's alleged coercion of the plaintiff to accept an exclusive use agreement that allowed defendant to be the exclusive retailer in the western United States for the plaintiff's garments.[128] Plaintiff's attorney and his firm regularly conducted Norrell's business affairs, and the attorney also served as one of Norrell's corporate officers.[129] The defendant sought to disqualify Norell and his firm because the attorney ought to testify in the dispute due to his "unique personal knowledge of Norrell's affairs and of the alleged violations."[130] Plaintiff and his firm argued the substantial hardship exception, citing that the firm had been working without compensation since 1974, and that it would be "impossible" to find another firm "experienced in dress-business litigation" that would take the case on a contingent fee basis.[131]

In a compromise solution, the court permitted counsel to continue to represent the plaintiff during pretrial proceedings and before the trial commenced, but disqualified the attorney and his firm for the actual trial.[132] In reaching the decision the court emphasized the substantial hardship that the client would suffer if the entire firm was disqualified, but also noted the importance in upholding the Disciplinary Rules that support the advocate-witness rule.[133]

Compared to a strict interpretation, the *Norman Norrell, Inc.* court's view of the substantial hardship exception offers a more equitable solution to both parties. The client of the disqualified firm gains the benefit of the firm's representation in preparation for trial, while the advocate-witness rule is

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[127] *See id.* at 131.
[128] *See id.* at 128.
[129] *See id.* at 128–29.
[130] *Id.* at 129.
[131] *Id.* at 130.
[132] *See id.* at 131.
[133] *See id.*

> The total loss of Manning's services as attorney to himself in effect as client would represent the loss of "distinctive" services indeed, for it can be expected that he will pursue this matter with unique loyalty and diligence. Nevertheless, Manning is an attorney and as such he is bound by the Code. The compromise he suggested hews to the Code's ethical spirit without violence to "the client's" wishes, and it serves the interests of substantial justice to both parties in this action.

*Id.*

upheld, benefitting the opposing party, the legal system, and legal profession. Still, this middle view ultimately leaves the client in the same position as the strict interpretation—without his chosen counsel, and having to obtain another attorney who is unfamiliar with his case.[134] One commentator remarks that the middle approach offers only a marginally better result.[135]

Applying this middle approach to the facts in *155 North High, Ltd.* results in the same outcome the narrow interpretation produced. Since Wiles had already participated in the pretrial preparation there was not an option to allow him to remain as counsel prior to trial and then to disqualify him at trial. Furthermore, regardless of which view was adopted, 155 North High still loses its selected representation, and faces the hardships of finding new counsel and delay in the resolution of its case. Though the middle view would not have changed the result in *155 North High, Ltd.*, the approach is superior to the strict view the court selected. Depending on the facts and timing of the motion to disqualify, the middle view would partially diminish the hardship a client suffers from disqualification by allowing the client's counsel to continue representation. Moreover, it would support the court's desire to uphold the advocate-witness prohibition since the attorney faces disqualification once the trial commences.

### C. *The Client-Based Approach*

Emphasizing the client's interest in retaining his or her chosen counsel, some courts have interpreted the substantial hardship exception more liberally, taking into account the client's preferences.[136] Unlike the other interpretations

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[134] Though one can argue whether the "middle view" is actually an offshoot of the strict view, the separate classification is appropriate. The middle view does consider the client's interests more fully than the strict approach because the court refrains from disqualifying the attorney from the rest of the proceedings. As the *Norman Norrell, Inc.* court provided, the attorney may continue to represent the client in preliminary proceedings, yet is disqualified once the trial begins. During this period the client can obtain new counsel, and the new attorney can "be brought up to speed" on the case from the original attorney. Therefore, the unfamiliarity problem is partially mitigated.

[135] *See* Note, *supra* note 21, at 1378–79 ("Although the . . . compromise approaches partially ameliorate the impact of the literalist interpretation, many clients may nevertheless find themselves in the unhappy position of ultimately losing their counsel of choice.").

[136] *See* J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975); Ampex Corp. v. United States, 211 Ct. Cl. 366 (1976); Kenosha Auto Transport Corp. v. United States, 206 Ct. Cl. 888 (1975); Greenebaum-Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348 (D. Colo. 1976); United States v. Baca, 27 M.J. 110 (C.M.A. 1988); Harris v. Superior Ct. of Santa Clara County, 158 Cal. Rptr. 807 (Ct. App. 1979).

that ultimately ignored the client's opinion as to whether or not to disqualify his counsel, the client approach specifically takes these preferences into consideration. For example, in *Greenebaum-Mountain Mortgage Co. v. Pioneer National Title Insurance Co.*,[137] the United States District Court for the District of Colorado held that plaintiff's attorney must be disqualified, but did not disqualify the attorney's entire law firm.[138]

The attorney in *Greenebaum-Mountain Mortgage* negotiated a construction loan and escrow agreement that named the defendant as escrowee, and drafted an agreement between the parties that became the focus of the litigation.[139] The defendant, fourteen months after the complaint had been filed, moved to disqualify the plaintiff's attorney and his firm under DR 5-102(A).[140] In holding that the attorney must be disqualified, but that his firm could continue to represent the plaintiff, the court recognized the substantial hardship the plaintiff would suffer if the firm was disqualified,[141] and noted the client's desire to have the firm continue its representation.[142] Taking such items into consideration contrasts sharply with the strict approach which ignores the client's wishes and any hardship on the client.

Unlike the strict interpretive approach, another court has also recognized that certain lawyers will offer a distinctive value to their clients because the

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[137] 421 F. Supp. 1348 (D. Colo. 1976).

[138] *See id.* at 1355.

[139] *See id.* at 1349–51.

[140] *See id.* at 1354.

[141] *See id.* at 1352.

> As to the fourth exception, it seems clear that there would be some hardship on Plaintiff if its corporate counsel of long-standing could not prosecute the case. One reason for maintaining a continuing relationship with a lawyer or law firm is to prevent the difficulty which would ensue if each time litigation was commenced a new attorney would be required to familiarize himself with the client and its business. . . . A client who desires to head off a court battle should not be penalized for having the foresight to employ legal counsel before the commencement of a lawsuit. Requiring a litigant to change counsel when a suit is filed surely causes some degree of hardship.

*Id.*

[142] *See id.* at 1354 (quoting Plaintiff's exhibit) ("Greenebaum 'desires the Law Firm to continue its representation in this lawsuit regardless of the involvement of Kenneth M. Robins.'"); *see also* J.P. Foley & Co., v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring) ("I would also direct the District Court to give the Foleys, after affording them full information about the problem, a chance to express their own preference.").

lawyers possess more legal talent. In *United States v. Baca*,[143] the United States Court of Military Appeals concluded that disqualification of defense counsel would cause a substantial hardship on the client in a criminal case involving drunk driving and involuntary manslaughter.[144] The court noted that the lawyer replacing the disqualified counsel had only been involved in the defense for three days, and her legal experience was limited to motion practice.[145] Because of the disqualified attorney's significant involvement in the case, the court concluded that "removing Deardorff's services as defense counsel 'would work a substantial hardship on the client because of the distinctive value of the lawyer . . . as counsel in the particular case.'"[146] Moreover, the court recognized that "[d]efense counsel are not fungible items. Although an accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with counsel in the absence of demonstrated good cause."[147] The court's opinion is the best example of a court interpreting the substantial hardship exception in favor of the client's interest in retaining his preferred attorney.[148] The *Baca* decision directly differs from the strict approach because the court recognizes that

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[143] 27 M.J. 110 (C.M.A. 1988). Even though the *Baca* decision is from the military courts it illuminates the discussion of the client-based approach because the court goes the furthest in stating that the client's interests and abilities of counsel should be considered when deciding whether to disqualify his attorney. In this respect, the opinion goes further than any other case in advocating the client's interests. Whereas *United States ex rel. Sheldon Elec. Co. v. Blackhawk Heating & Plumbing Co.*, 423 F. Supp. 486 (S.D.N.Y. 1976), represents one extreme (an example of the strict approach), *Baca* represents the opposite extreme. For other cases that apply a client-oriented analysis, see *supra* note 136.

[144] *Baca*, 27 M.J. at 117.

[145] *See id.*

[146] *Id.*

[147] *Id.* at 119.

> Deardorff had represented Baca for some 5 months prior to his removal by the military judge. As his affidavit vividly illustrates, these 5 months were very active months in an effort to prepare a defense, and they were months during which Deardorff came to establish a sincere professional concern for and sensitivity to his client's plight of nonrememberance.
>
> On the other hand Spahn had represented Baca for only 3 days when the litigation giving rise to this appeal began. While the record reflects her as a competent and dedicated defense attorney, it is impossible to speculate whether she pursued Baca's interests in the same manner as Deardorff would have or arrived at the same end.

*Id.*

[148] *See* Stonerock, *supra* note 9, at 839.

familiarity with the case makes the attorney of distinctive value to the client, and subsequent disqualification would work a substantial hardship on the client.

The liberal approach enables the client to prove the distinctive value of his counsel more easily, which, in turn, allows the court to find the substantial hardship exception applicable.[149] Furthermore, the courts applying a broader interpretation of substantial hardship usually place the burden on the party claiming prejudice, rather than on the testifying attorney.[150] Under the client-based approach substantial hardship exception, the outcome in *155 North High, Ltd.* would be different. Though the client's interests in retaining his attorney assume greater importance under the client-based approach, they are not controlling.[151] Therefore, assuming that 155 North High wanted to keep Wiles as its counsel, it would still have to show substantial hardship.[152] The facts of the case suggest a lengthy professional relationship between 155 North High and Wiles.[153] Furthermore, Wiles's experience in dealing with fire loss claims also indicates that Wiles offered a distinctive value to 155 North High. Wiles's disqualification would exert a substantial hardship on 155 North High because of this distinctive value. Thus, if 155 North High wanted Wiles to remain as counsel, then Wiles would not be disqualified.

## V. AN ALTERNATIVE APPROACH

The results produced by a strict interpretation of the substantial hardship exception renders the exception largely useless for most clients to whom the advocate-witness rule applies. This rigidity, coupled with the vulnerability of the rationales supporting the rule may lead to a conclusion that the advocate-witness prohibition should be eliminated. If it was eliminated, then the judge's supervisory capacity and the rules of evidence would facilitate the trial process when the issue arose. However, eliminating the advocate-witness rule would prevent any of the beneficial safeguards the rule does provide.[154] Therefore,

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[149] *See* Note, *supra* note 21, at 1383–84 ("The courts appeared willing to regard the 'distinctive value' component of that exception as satisfied simply by the fact that the client had chosen and continued to rely on the contested counsel.").

[150] *See id.* at 1384.

[151] *See* J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) ("[The client's] expression will, of course, not be binding on the court . . . .").

[152] *See* Note, *supra* note 21, at 1383 ("Of course, none of the . . . decisions held the rule inapplicable . . . .").

[153] *See supra* note 115.

[154] The main benefit is the protection of the legal system and legal profession, but some cases would exist where disqualification is necessary to protect opposing counsel, or to protect the client if he or she does not want the attorney to continue representation.

the best solution would be a compromise between protecting the client's interests and safeguarding the legal system and opposing counsel.

The balance between upholding the rationales supporting the advocate-witness rule and protecting the interests of the client has been reached in the ABA Model Rules of Professional Conduct Rule 3.7. The Model Rules are the product of the Kutak Commission, which was appointed in 1977 by the ABA.[155] After several drafts, the ABA House of Delegates officially adopted the ABA Model Rules of Professional Conduct on August 2, 1983.[156] As of early 1995, 37 states had adopted the Model Rules.[157] However, many of these states adopt the Rules with minimal to extensive variations, and still other states have not adopted the Rules.[158] Since Ohio has not adopted the Model Rules, *155 North High, Ltd.* was decided based on the Model Code of Professional Responsibility. Model Rule 3.7 provides the Model Rules' version of the advocate-witness rule.[159] Conspicuously absent from Rule 3.7(a)(3) is the "distinctive value" requirement found in DR 5-101(B)(4). Not requiring the client to prove the distinctive value of his attorney produces a substantial hardship exception that is easier to satisfy.[160] Furthermore, unlike the strict

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[155] *See* STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (1996).

[156] *See id.*

[157] *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 5 (4th ed. 1995).

[158] *See id.* California, for instance, has not adopted the Model Rules. Also, New Mexico has adopted a version that is similar to the Model Rules provision, except that it eliminates the substantial hardship exception. *See* N.M. RULES OF PROFESSIONAL CONDUCT § 16-307 (1987).

[159] Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.7 (1995).

[160] There are two other differences between the Model Rule and the Disciplinary Rules. First, Rule 3.7(a) only disqualifies the attorney from the trial, not pre-trial work. *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.7 (1995). In this sense, the Model Rule resembles the Middle Approach discussed in Part IV.B. Second, Rule 3.7(b) indicates that the rule only disqualifies the attorney rather than the whole firm. *See id.* The differences between Rule 3.7(a) and DR 5-101 and DR 5-102 prompted two scholars to state that "Rule

interpretation of DR 5-101(B)(4), a comment to Rule 3.7 expressly considers the affect the disqualification will have on the client.[161] The balancing approach offers a more equitable approach to all parties, especially the client.

Given the balancing test approach suggested, a court could interpret the interests of the client in such a fashion to render the rule "toothless." Whereas the Disciplinary Rules create a rigid rule with harsh results for the client, the balancing approach may lead to results that ignore the importance of protecting the legal system, the legal profession, and the opposing party.[162] However, the Disciplinary Rules are subject to abuse since they can be used as a tactical weapon to disqualify an opposing party's attorney.[163] Moreover, the Disciplinary Rules, when applied strictly, do not adequately consider the client's interests, even though the rule is meant to protect these interests.[164] Each approach possesses flaws, but the Model Rules approach, offers a solution that can protect the client, the opposing party, and the public's perception of the legal system.[165]

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3.7(a) is . . . more carefully tailored than its predecessors, DR 5-101(b) and DR 5-102 . . . ." GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.7:201 (Supp. 1994).

[161] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 cmt. 4 (1995).

> [P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified *due regard must be given to the effect of disqualification on the lawyer's client.*

*Id.* (emphasis added); *see also* Dalton, *supra* note 9, at 329.

[162] An attorney may know that he will be called as a witness for his client, yet remain as counsel. When the disqualification issue arises, he may be able to shield himself from removal because it would work a substantial hardship on this client. Consequently, an attorney acting purely in bad faith may be able to "beat" the rule.

[163] *See supra* note 65 and accompanying text.

[164] The Disciplinary Rules emphasize protection of the legal system and the opposing party. On the other hand, the Model Rules provision shifts the focus to the client. The importance one places on these factors should dictate what view to adopt. The Model Rules approach is superior because it focuses on the client's interests, yet does not ignore the interests in protecting the legal system and opposing counsel. In contrast, the Disciplinary Rules approach focuses on the legal system and the opposition, yet completely ignores the client's interests.

[165] Though Rule 3.7 does state that the client's interests should be considered, the comment also instructs the court to consider the prejudice to the opposing party. To

Ohio should adopt an approach identical or similar to the one provided in the Model Rules. Under the Model Rules, disqualification of Wiles may have caused a substantial hardship to the client depending on how long Wiles had spent in preparation of the case, and the length of the relationship between Wiles and 155 North High. Cincinnati Insurance would still gain protection because the court would have to balance any substantial hardship with potential prejudice to Cincinnati Insurance. Based on the facts, nothing appears to be overly prejudicial to Cincinnati Insurance. Wiles's testimony would be prejudicial to Cincinnati Insurance, but all testimony is prejudicial to some degree for the party against whom it is being offered. Thus, under the Model Rules, Wiles would not have been disqualified.

## VI. CONCLUSION

*155 North High, Ltd.* shows that courts still favor a strict approach to defining substantial hardship and distinctive value in DR 5-101(B)(4). The results that the strict approach produces, however, often seem unjust when the client loses an attorney with whom he has a long-standing relationship, or has a unique knowledge of the case. One of the Ohio Supreme Court's main flaws was its failure to define the terms substantial hardship and distinctive value with meaningful clarity, which would allow attorneys to better conform their actions to the rule. Aside from holding that DR 5-101(B)(4) is an exception to DR 5-102(A), the court's opinion lacks any substantive information to guide the lawyer when faced with the complex decisions concerning the advocate-witness rule.

The court's casual acceptance that its decision supports the rationales upon which the rule is founded is also troubling. The advocate-witness rule, as applied, does not further the rationales that support the rule.[166] Even if the interests are protected, they are done so at a cost to the client that outweighs the benefits.

The court could have adopted two alternative approaches to decide the case, either of which would be favorable to the reasoning it eventually adopted. First, the court could have defined substantial hardship and distinctive value under a client-based approach. In doing so, the court places more significance on the client's interests. The problem with this solution is the potential for the advocate-witness prohibition to lose all effectiveness in cases where an attorney

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determine the potential prejudice to the opposing party depends on the nature of the case, the nature and importance of the lawyer's testimony, and probability that the lawyer's testimony will conflict with that of other witnesses. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 cmt. 4 (1995).

[166] *See supra* Part II.

should be disqualified. The second, and best alternative, would be to adopt an approach similar to the one defined in Model Rule 3.7. By eliminating the distinctive value requirement and balancing the client's interests with the interests in protecting the opposing party and the public's perception of the legal system, a more equitable analysis is developed.

However, the Ohio Supreme Court adopted a strict interpretation of substantial hardship and distinctive value, and failed to define these terms adequately. Consequently, Ohio attorneys will have to grapple continually with the difficulties posed when they may serve as both an advocate and a witness.